IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2237 OF 2004.

Uttamrao Laxman Kadam. ... Petitioner
Versus.
State of Maharashtra & ors. ... Respondents.

Shri A.P.Mundargi with Shri P.N.Arjunwadkar for the Petitioner.

Shri A.G.Gadkari, A.P.P.for the Respondent-State.

Shri A.Y.Sakhare, Senior Counsel with Shri P.M.Havnur for Respondent No.4.

ALONG WITH

CRIMINAL WRIT PETITION NO. 2249 OF 2004

Ramrao Eknathrao Pawar. ... Petitioner.
Versus.
The State of Maharashtra & anr. ... Respondents.

Shri Niranjan Mundargi for the Petitioner.

Shri A.S.Gadkari, A.P.P. for the Respondent-State.

Shri A.Y.Sakhare, Senior Counsel with Shri P.M.Havnur for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 1st July, 2005.

P.C.:

1. On the last date these petitions were taken up for final disposal by consent of the Counsel appearing for the parties. These petitions can be disposed of by a common order as the challenge in both the petitions is to the same impugned order. For the sake of convenience a reference is made to the facts of the case in Criminal

Writ Petition No.2237 of 2004.

2. On a complaint filed by the Respondent No.4 on 5th September 2003 a trap was laid by an Assistant Commissioner of Police. The allegation of the Complainant is that for releasing the tanker hired by him, another accused Shri Nitin Patil who was a Police Officer demanded a sum of Rs.3,00,000/-. The Petitioner who was a Senior Inspector of Police demanded a total sum of Rs.5,00,000/- from the Complainant. The allegation is that the Petitioner produced the Respondent No.4 i.e. the Complainant before the Superintendent of Police, Thane (Rural), who is the Petitioner in Criminal Writ Petition No.2249 of 2004 and he also ratified the demand made for the sum of Rs.5 lakhs. The allegation is that the Assistant Inspector of Police Shri Nitin Patil asked the Respondent No.4 to hand over a sum of Rs.3 lakhs to one Shri Himmat Nanda who was present in the office of the Superintendent of Police, Thane (Rural). The Officer of the Anti-Corruption Bureau on the basis of the said complaint laid a trap on 5th September 2003 and in the said trap it is alleged that the said Shri Himmat Nanda was trapped accepting Rs.3 lakhs from the Respondent No.4.

3. F.I.R. bearing No.3071 of 2003 was registered at the Thane Town Police Station for offences under sections 7, 8, 12, 13(1)(d) and 13(2) of the Prevention

of Corruption Act, 1988. The Respondent No.4 filed Writ Petition No.1375 of 2003 in this Court praying that the investigation of the said offence be transferred to C.B.I. or C.I.D. or some other agency. By Judgment and order dated 14th October 2003, this Court did not grant relief in favour of Respondent No.4 and observed that considering the seriousness of the allegations made by the Respondent No.4 in the said petition, to rule out any possibility of any allegation of biased investigation being levelled against the investigation agency, the Director General A.C.B. will take keen interest in the investigation and supervise it.

4. On 31st July 2004, a report under section 173(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code) was filed by the Investigating Officer. In the said report it was stated that after taking opinion of the Director of Prosecution, it was decided that against the Petitioners in these two petitions no further action should be taken as no evidence was available against them. The report also records that as far as Nitin Patil, Assistant Inspector of Police is concerned, the State Government declined to grant sanction for prosecuting the said officer for commission of various offences under the Prevention of Corruption Act, 1988.

5. The report under section 173(2) of the said Code was

placed before the learned Special Judge. The said Report was numbered as Misc.Application No.153 of 2004. After considering the objections raised by the Respondent No.4/Org.Complainant, by impugned order dated 15th October 2004, the learned Special Judge, Anti-Corruption, Thane, held that the report cannot be accepted and there was no question of granting either of the summary. The learned Judge held that the further investigation as contemplated by section 173(8) of the said Code was required to be conducted and he directed the Director General of Anti Corruption Bureau, Mumbai, either to take up further investigation himself or depute any officer of the rank of D.I.G. or above DIG rank for such investigation.

6. Shri Mundargi, the learned Counsel appearing for the Petitioner submitted that the learned Special Judge had no jurisdiction to issue a direction that further investigation should be carried by an officer of a particular rank. He submitted that the reasons given by the learned Judge for ordering further investigation under section 173(8) are totally irrelevant. He submitted that as a result of the direction given by the learned Special Judge the investigating agency has started investigation on altogether different offence against the Petitioners under the Prevention of Corruption Act based on the allegation of possessing assets disproportionate to income.

7. The learned A.P.P. submitted that the investigating agency appointed by the learned Special Judge is investigating into the offence registered under the F.I.R. No.3071/03 at Thane Town Police Station and in so far as the other allegations against the Petitioners regarding possession of disproportionate assets are concerned, a totally separate branch is conducting a preliminary enquiry. Shri Sakhare the learned Senior Counsel appearing for the Respondent No.4 submitted that the learned Special Judge was well within his powers to reject the report submitted by the Investigating Agency and to pass a direction for further investigation under section 173(8). He submitted that once the learned Special Judge exercised the option of directing further investigation, the said direction cannot be interfered with by this Court either under Article 226 and 227 of the Constitution of India or under section 482 of the said Code. He submitted that considering the evidence collected by the Investigating Agency, the report was uncalled for inasmuch as there was sufficient material against both the Petitioners to proceed further.

8. I have considered the rival submissions. The law on this point is no more res-integra and there are decisions of the Apex Court on the said aspect. A reference will have to be made to the recent decision of the Apex Court reported in (2001) 7 S.C.C. page 536

(Hemant Dhasmana v/s. Central Bureau of Investigation and another). The Apex Court considered the powers of the Court while dealing with the report under section 173(2) of the said Code. The Apex Court held that when the report is filed before the learned Magistrate or before the learned Special Judge, he has to deal with it by bestowing his judicial consideration. The Apex Court held that the learned Special Judge may accept the report and drop the proceedings. The second option available to the learned Special Judge is to disagree with the report and take cognizance of the offence, if the learned Judge is of the opinion that there is sufficient ground for proceeding further. The third option is to direct further investigation. The Apex Court in paragraph 15 of the said decision held thus:

> "15. **When the report is filed under the sub-section the Magistrate (in this case the Special Judge) has to deal with it by bestowing his judicial consideration.** If the report is to the effect that the allegations in the original complaint were found true in the investigation, or that some other accused and/or some other offences were also detected, the court has to decide whether cognizance of the offences should be taken or not on the strength of that report. We do not think that it is necessary for us to vex our mind, in

> this case, regarding that aspect when the report points to the offences committed by some persons. But when the report is against the allegations contained in the complaint and concluded that no offence has been committed by any person, it is open to the court to accept the report after hearing the complainant at whose behest the investigation had commenced. If the court feels on a perusal of such a report that the alleged offences have in fact been committed by some persons the court has the power to ignore the contrary conclusions made by the investigating officer in the final report. Then it is open to the court to independently apply its mind to the facts emerging therefrom and it can even take cognizance of the offences which appear to it to have been committed, in exercise of its power under section 190(1)(b) of the Code. The third option is the one adumbrated in section 173(8) of the Code."
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> (Emphasis supplied).

The Apex Court further proceeded to hold in paragraph 20 as under:

> "20. When the Special Judge has opted to order for a further investigation the High

> Court should have stated to CBI to comply with that direction. Nonetheless, we are in agreement with the observation of the learned Single Judge of the High Court that the Special Judge or the Magistrate could not direct that a particular police officer or even an officer of a particular rank should conduct such further investigation. It is not within the province of the Magistrate while exercising the power under section 173(8) to specify any particular officer to conduct such investigation, not even to suggest the rank of the officer who should conduct such investigation."

The Apex Court in paragraph No.20 of the said decision specifically held that **"It was not within the province of the Magistrate while exercising power under section 173(8) to specify any particular officer to conduct such investigation, not even to suggest the rank of officer to conduct such investigation."**

9. Hence it is obvious that in the case in hand the learned Special Judge exceeded the jurisdiction vested in him by directing the Director General of Anti Corruption Bureau to take up the further investigation under section 173(8) either himself or entrust it to any officer of the rank of D.I.G. Thus, that part of the

order passed by the learned Special Judge will have to be set aside.

10. As held by the Apex Court the learned Special Judge was expected to deal with the report by bestowing his judicial consideration. A perusal of the order shows that the learned Judge has recorded three reasons for passing the order for further investigation. The first reason is that the reasons recorded by the Competent Authority refusing to grant sanction to prosecute P.S.I. Nitin Patil were not intimated to the Government. The second reason is that the Respondent No.4 had addressed a letter to the Director General of Police giving a list of the alleged disproportionate property held by the Petitioner in Writ petition No.2237 of 2004, Shri Nitin Patil and Shri Anil Pawar and this aspect was not investigated. The last ground given is that it cannot be said that the investigation is completed because of the earlier two alleged infirmities.

11. In so far as the first reason given by the learned Judge is concerned, hardly any comment is required. Surely non-communication to the Government of the grounds on which sanction to prosecute one of the officers is refused by the Competent Authority cannot be said to be a ground by itself for ordering investigation under section 173(8). In so far as the second ground given by the learned Judge is concerned, as stated

earlier the learned A.P.P. stated that the allegations made by the original Complainant-Respondent No.4 regarding disproportionate assets by the accused, a separate branch is making enquiry in that respect. In any event, report under section 173(2) related to the offence which was registered under C.R.No.II-3071 of 2003 and which was being investigated in connection with the trap case. Therefore, failure to investigate an altogether different offence was no ground to reject the report. On the basis of the first two grounds given by the learned Judge it cannot be held that the report suffers from infirmities and therefore investigation was not completed.

12. A perusal of the impugned order passed by the learned Special Judge shows that there is no judicial consideration of the report under section 173(2) by the learned Special Judge. A perusal of the order does not show that the learned Judge examined the material which was placed along with the report under section 173(2) of the said Code.

13. Thus, in my view this is a case where the matter will have to be remanded to the learned Special Judge for fresh consideration of the report under section 173(2) of the said Code in accordance with the law laid down by the Apex Court. At this stage, the learned Counsel appearing for the Petitioner submitted that the

order of remand cannot be passed once it is found that the order of the learned Judge is erroneous. As I have found that there is non application of mind on the part of the learned Judge while considering the report under section 173(2) and as relevant factors are not considered by the learned trial Judge, the report needs to be reconsidered by the learned Judge.

14. Hence the following order is passed:

(i) The impugned order dated 15th October, 2004 is quashed and set aside.

(ii) The learned Special Judge, Anti Corruption, Thane, will consider afresh the report submitted by the Investigating officer under section 173(2) of the said Code in accordance with law.

(iii) The Petitions are partly allowed in the above terms.

(iv) Parties and the concerned Court to act on an authenticated copy of this order.

Judge.